

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF &
APPENDIX**

76-1589

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1589

UNITED STATES OF AMERICA,

Appellee,

—v.—

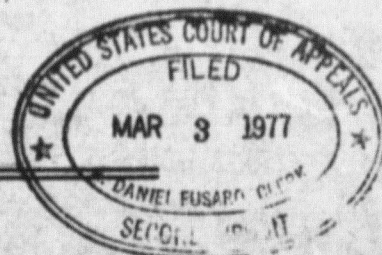
MANUEL ALFONSO RODRIGUEZ, and
RAYMOND GERALDO,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

**BRIEF AND APPENDIX ON BEHALF OF
DEFENDANT RAYMOND GERALDO**

GORDON J. LANG, ESQ.
Attorney for Defendant
Raymond Geraldo
299 Broadway
New York, New York 10007
(212) 233-1177



PAGINATION AS IN ORIGINAL COPY

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- - - - -X
UNITED STATES OF AMERICA, :
Appellee, :
VS. :
MANUEL ALFONSO RODRIGUEZ, and :
RAYMOND GERALDO, :
Defendants-Appellants. :
- - - - -X

STATEMENT AND FACTS

The defendant Raymond Geraldo, was in the United States District Court for the Southern District of New York under indictment number 76 CR.503 which was filed on May 25, 1976. The indictment alleged from counts. Trial was held before District Judge Duffy and a jury on September 20, 21, 23, 24, 27, 28, 29, 30, October 1, 5, 8, 1976. On October 8, 1976, the jury returned a verdict of guilty against this defendant on all four counts. The defendant, on November 22, 1976, was sentenced to a jail term of four (4) years on each count to be served consecutively. The defendant duly and timely filed his notice of appeal on November 30, 1976.

The facts, issues and points in respect to this appeal are substantially the same as those presented on the companion appeal of the defendant, Manuel Alfonso Rodriguez, to which reference is respectfully made for all purposes.

It is respectfully requested that the brief and appendix on appeal in that case be incorporated herewith.

GORDON J. LANG, ESQ.
Attorney for Defendant
Raymond Geraldo
Office & P. O. Address
299 Broadway
New York, New York 10007
(212) 233 1177

Dated: February 25, 1977

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - x
UNITED STATES OF AMERICA :
 :
- v. - : INDICTMENT
 :
DOMINICK CAGIANESE, : 76 CR 503
FRANK G. ALVAREZ, :
IRWIN TOBOGMAN, :
ROBERT MICHAELSON, :
RAYMOND GERALDO, :
MIGUEL B. CELIS, and :
MANUEL ALFONSO RODRIGUEZ, :
 :
Defendants. :
- - - - - x

INTRODUCTION

1. At all times material to this Indictment, the defendant, DOMINICK F. CAGIANESE, was an American citizen employed as the Director of Aeronautics, Mott Haven Industries, Ltd., 439 Bruckner Boulevard, Bronx, New York.

2. At all times material to this Indictment, the defendant, FRANK G. ALVAREZ, was an American citizen employed by Mott Haven Industries, Ltd., 429 Bruckner Boulevard, Bronx, New York, as its Marketing Director for Latin America.

3. At all times material to this Indictment, the defendant, IRWIN TOBOGMAN, was an American citizen and self-employed businessman conducting his business affairs from his residence located at 415 East 52 Street, New York, New York.

4. At all times material to this Indictment, the defendant, RAYMOND GERALDO, was a self-employed businessman and an American citizen.

5. At all times material to this Indictment, the defendant, ROBERT MICHAELSON, was an American citizen employed as the President of Wittington Imports, Ltd. Great Neck, New York.

6. At all times material to this Indictment, the defendant, MIGUEL D. CELIS, was a self-employed businessman residing in San Salvador, El Salvador, Central America and was a citizen of that country.

7. At all times material to this Indictment, the defendant, MANUEL ALFONSO RODRIGUEZ, was the Chief of Staff of the Armed Forces of El Salvador, Central America, and a citizen of that country.

COUNT ONE

The Grand Jury charges:

I. THE CONSPIRACY

8. From on or about January 1, 1976 and continuously thereafter up to and including May 15, 1976, in the Southern District of New York and elsewhere, DOMINICK CAGIANESE, FRANK G. ALVAREZ, IRWIN TOBOGMAN, ROBERT MICHAELSON, RAYMOND GERALDO, MIGUEL D. CELIS and MANUEL ALFONSO RODRIGUEZ, the defendants, Howard Peters named herein as an unindicted co-conspirator but not as a defendant, and others to the Grand Jury unknown, unlawfully, willfully and knowingly did combine, conspire,

confederate and agree together and with each other to commit certain offenses against the United States, to wit, violations of Title 26, United States Code, Sections 5811, 5812, 5861(d) and (e) (Title II of the Gun Control Act of 1968) and of Title 18, United States Code, Sections 1001 and 2.

II. OBJECTIVES OF THE CONSPIRACY

9. The objective of the conspiracy was to secretly sell weapons, munitions and other implements of war to buyers in the United States in a manner designed and intended to conceal from the United States Department of State and the United States Department of the Treasury the true identities of the buyers.

10. In order to attain their objective, the members of the conspiracy also agreed to seek to prepare and file with the United States Department of State certain false and fraudulent documents intended to create the false and misleading appearance that certain weapons and munitions were to be purchased by foreign countries for the exclusive use of their armed forces in their national defense.

III. MEANS OF THE CONSPIRACY

11. Among the means by which the defendants would and did carry out the said conspiracy were the following:

(a) Between, on or about March 20, 1976 and May 15, 1976, the defendants prepared, facilitated the preparation of, and caused to be prepared certain false and fraudulent documents

including: (i) an official United States Department of State Form DSP-5, entitled "Application/License for Permanent Export of Unclassified Implements of War ..."; (ii) a certificate, dated April 22, 1976, bearing the signature of the defendant Colonel Manuel Alfonso Rodriguez; (iii) a copy of a purchase order for 10,000 submachine guns and 1.5 million rounds of ammunition, dated May 3, 1976, signed by Howard Peters as purchasing agent on behalf of San Pan Trading Corporation; and (iv) a United States Department of State, Office of Munitions Control, Form DSP-83, entitled "Consignee Purchaser Transaction Statement" signed by the defendant Colonel Manuel Alfonso Rodriguez and bearing his official government seal.

(b) On or about May 5, 1976, the defendants filed, facilitated the filing of, and caused to be filed with the United States Department of State the false and fraudulent documents referred to in Subparagraphs 11(a)(i), and (iii) above.

OVERT ACTS

In furtherance of said conspiracy and in order to accomplish its objectives, the defendants committed the following overt acts, among others in the Southern District of New York and elsewhere:

1. On or about March 20, 1976 the defendant ROBERT MICHAELSON travelled to the Pepper Tree Restaurant, Mt. Kisco, New York in order to meet and negotiate with prospective buyers of weapons, munitions and other implements of war.

2. On or about March 21, 1976 the defendant RAYMOND GERALDO travelled to the Pepper Tree Restaurant, Mt. Kisco, New York and had a conversation concerning the sale of certain weapons, munitions and other implements of war.

3. On or about March 22, 1977 the defendants DOMINICK CAGLIANESE and RAYMOND GERALDO met at the Pepper Tree Restaurant, Mt. Kisco, New York and had a conversation concerning arrangements to obtain from an official of a foreign government false and fraudulent documents to be filed with the United States Department of State.

4. On or about March 27, 1976, March 29, 1976 and April 14, 1976, at the Pepper Tree Restaurant, Mt. Kisco, New York, the defendants DOMINICK CAGIANESE, FRANK G. ALVAREZ, RAYMOND GERALDO and ROBERT MICHAELSON had conversations concerning an initial sale of 10,000 submachine guns for a price of \$2,800,000.

5. On or about April 1, 1976, the defendant DOMINICK CAGIANESE travelled to the vicinity of Winston-Salem, North Carolina in order to observe and participate in a test firing

demonstration of a "Bushmaster" submachine gun.

6. In or about April 1976, the defendant RAYMOND GERALDO travelled to Central America for the purpose of obtaining a false and fraudulent certificate from an official of a Central American country.

7. On or about May 2, 1976, the defendants RAYMOND GERALDO, ROBERT MICHAELSON, DOMINICK CAGIANESE and MIGUEL D. CELIS met at the Pepper Tree Restaurant, Mt. Kisco, New York, and had a conversation concerning a cash payment to be made to the defendant MANUEL ALFONSO RODRIGUEZ in return for the defendant RODRIGUEZ facilitating the filing of false and fraudulent documents with the United States Department of State.

8. On or about May 3, 1976 the defendants FRANK G. ALVAREZ, MIGUEL D. CELIS and RAYMOND GERALDO met at the offices of Mott Haven Industries, Ltd., 429 Bruckner Blvd., Bronx, New York and had a conversation concerning the preparation of false and fraudulent documents to be filed with the United States Department of State.

9. On or about May 4, 1976, the defendants FRANK G. ALVAREZ, MIGUEL D. CELIS and RAYMOND GERALDO met at the offices of Mott Haven Industries, Ltd., 429 Bruckner Blvd., Bronx, New York, and had a further conversation concerning arrangements to file certain false and fraudulent documents with the United States Department of State.

10. On or about May 5, 1976 the defendant FRANK G. ALVAREZ directed one of his employees to deliver certain false and fraudulent documents to the United States Department of State, Washington, D. C.

11. On or about May 14, 1976 the defendant FRANK G. ALVAREZ Placed a telephone call from the offices of Mott Haven Industries, Ltd. to El Salvador, Central America.

12. On or about May 14, 1976, the defendant FRANK G. ALVAREZ placed a telephone call from the offices of Mott Haven Industries, Ltd., to the United States Department of State, Washington, D. C.

13. On or about May 15, 1976, the defendants MANUEL ALFONSO RODRIGUEZ, MIGUEL D. CELIS, RAYMOND GERALDO, IRWIN TOBOOMAN, ROBERT MICHAELSON and FRANK G. ALVAREZ met at the Holiday Inn, Mt. Kisco, New York and discussed their plan to sell weapons, munitions and other implements of war to buyers in the United States.

14. On or about May 15, 1976, at the Holiday Inn, Mt. Kisco, New York, the defendants MANUEL ALFONSO RODRIGUEZ and MIGUEL D. CELIS received the approximate sum of \$75,000 in cash for having provided, and having agreed to provide certain false and fraudulent documents filed and to be filed with the United States Department of State.

15. On or about May 15, 1976, at the Holiday Inn, Mt. Kisco, New York, the defendants ROBERT MICHAELSON and IRWIN TOBOOMAN received the approximate sum of \$25,000 in cash for having facilitated the preparation of false and fraudulent documents filed and to be filed with the United States Department of State.

(Title 18, United States Code, Section 371).

COUNT TWO

The Grand Jury further charges:

On or about May 5, 1976, in the Southern District of New York and elsewhere, DOMINICK CAGIANESE, FRANK G. ALVAREZ, IRWIN TOBOCMAN, ROBERT MICHAELSON, RAYMOND GERALDO, MIGUEL D. CELIS, and MANUEL ALFONSO RODRIGUEZ, the defendants, in a matter within the jurisdiction of a department or agency of the United States, to wit, the United States Department of State, unlawfully, wilfully and knowingly did make, facilitate the making of, and cause to be made certain false, fictitious and fraudulent statements and representations on a United States Department of State Form DSP-5, entitled, "Application/ License for Permanent Export of Unclassified Implements of War ..." that 10,000 "Bushmaster" submachine guns having an approximate value of \$2,550,000 together with 1.5 million rounds of ammunition for the said submachine guns were to be exported to the nation of El Salvador, Central America for use in El Salvador's national defense, whereas, in truth and in fact, the defendants then and there well knew that the said 10,000 "Bushmaster" submachine guns were to be sold to individuals in the United States at a price of approximately \$2,800,000 and further that the 1.5 million rounds of ammunition were to be sold to the same individuals in the United States.

(Title 18, United States Code, Sections 1001 and 2.)

COUNT THREE

The Grand Jury further charges:

On or about May 5, 1976, in the Southern District of New York and elsewhere, DOMINICK CAGIANESE, FRANK G. ALVAREZ, IRWIN TOBOGMAN, ROBERT MICHAELSON, RAYMOND GERALDO, MIGUEL D. CELIS, and MANUEL ALFONSO RODRIGUEZ, the defendants, in a matter within the jurisdiction of a department or agency of the United States, to wit, the United States Department of State, unlawfully, willfully and knowingly did make, facilitate, the making of, and cause to be made certain false, fictitious and fraudulent statements and representations on a certificate dated April 22, 1976 on the official letterhead of the "Estado Mayor General De La Fuerza Armada, San Salvador, El Salvador, C.A.", bearing the signature of the defendant Manuel Alfonso Rodriguez, that 10,000 "Bushmaster" submachine guns and 1.5 million rounds of ammunition for said submachine guns were to be used by the armed forces of El Salvador and would not be re-exported to any third party whereas, in truth and in fact, the defendants then and there well knew that the said 10,000 "Bushmaster" submachine guns and the 1.5 million rounds of ammunition were to be sold to individuals in the United States.

(Title 18, United States Code, Sections 1001 and 2.)

COUNT FOUR

The Grand Jury further charges:

On or about May 5, 1976, in the Southern District of New York and elsewhere, DOMINICK CAGIANESE, FRANK G. ALVAREZ, IRWIN TOBOGMAN, ROBERT MICHAELSON, RAYMOND GERALDO, MIGUEL D. CELIS, and MANUEL ALFONSO RODRIGUEZ, the defendants, in a matter within the jurisdiction of a department or agency of the United States, to wit, the United States Department of State, unlawfully, willfully and knowingly did make, facilitate the making of, and cause to be made certain false, fictitious and fraudulent statements and representations on a purchase order, dated May 3, 1976, from San Pan Trading Corporation, 3 Wren Drive, Woodbury, New York, to Mott Haven Industries, Ltd., 429 Bruckner Boulevard, Bronx, New York, that 10,000 machine guns at a price of \$245 each together with 1.5 million rounds of ammunition were to be exported to El Salvador, Central America, whereas, in truth and in fact, the defendants then and there well knew that the 10,000 machine guns were to be sold to individuals in the United States for approximately \$2,300,000 and further that the 1.5 million rounds of ammunition were to be sold to the same individuals in the United States.

(Title 18, United States Code, Sections 1001 and 2.)

/s/ _____
FOREMAN

/s/ Robert B. Fiske, Jr.
ROBERT B. FISKE, JR.
United States Attorney

JUDGE DUFFY

02-CERALDO, RAYMOND		Case File No. 76 0503 02
0208 01	0860	05-25-76
OFFENSES CHARGED 18:371 18:1001 & 2 Consp. to deal in Firearms. False statements to Gov't/ Agency.		ORIGINAL COUNTS 1 2-4
KEY DATES & INTERVALS		SUPERSEDED COUNTS
ARREST OF 5/18/76	INDICTMENT 5-25-76	ARRAIGNMENT 5-27-76
TRIAL 9-20-76	SENTENCE 10-8-76	11-22-76
MAGISTRATE		OUTCOME
5/16/76	MDJ-080B	MDJ-080B
OFFENSE (in Complaint)		ACT.
18 USC 371, 26 USC 5811, 5812, 5861(c), 18 USC 1001, (2) - VIOLATION OF GUN CONTROL		

Robert Gold
791-1942

Gordon J. Lang, Esq.
299 Broadway
New York, N. Y.

-1209

01-RODRIGUEZ, 03-MICHAELSON, 04-TOBOGMAN, -05-CAGIANESE, -06-ALVAREZ-07-CELIS	EXCLUSIBLE DELAY
5/16/76	Complaint filed, to retain counsel, Defendant remanded into the custody of U.S. Marshal in lieu of \$500,000 cash or surety.
5/24/76	Notice of Appearance filed by Biaggi, Ehrlich & Lani, 299 Broadway, N.Y.
5/25/76	Indictment filed, 76 Cr. 503
5-27-76	Deft. (Atty present) enters a not guilty plea. 10 days for motions. Bail cont'd fixed at \$500,000. Deft. remanded. Case assigned to Duffy, J...Briant, J.
5-27-76	Deft (atty. present) withdraws application for reduction of bail....DUFFY, J.
6-2-76	Filed notice of appearance...
6-11-76	Motion for Bail Reduction Heard and Decided - So Ordered. DUFFY, J.
6-17-76	Pre-trial conf. held and concluded. 8-15-76 last day to file motions trial date 9-20-76....Duffy, J.
6-17-76	Filed appearance bond in amt. of \$500,000 co-signed by father in law, mother in law, depts wife and a friend....
6-28-76	Filed Temporary Commitment, Dated: 5-16-76. JACONS, US Mag.
7-14-76	Filed REMAND dated 6-17-76 -Deft released on bail.

(CONT'D --PAGE 2-- OVER)

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DATE	PROCEEDINGS
9-22-76	Trial cont'd.
9-24-76	Trial cont'd. adj to 9-27-76
9-27-76	Trial cont'd.
9-28-76	Trial cont'd. 4:30P.M. RAYMOND GERALDO - Bail revoked, deft REMANDED to custody of the U.S. Marshal. 4:30P.M. Conference held-Upon further information received-Deft. GERALDO's BAIL REINSTATED.
9-29-76	Trial cont'd.
9-30-76	Trial cont'd.
10-1-76	Trial cont'd. Adj. to 10-5-76...
10-6-76	BEFORE DUFFY - Conference Held RE: Requests to charge & various motions to Dismiss, Mistrial, ETC. SEE Transcript dated this day.
10-12-76	Filed Govt's Requests to charge.
10-12-76	Filed Govt's Supplemental Requests to Charge.
10-12-76	Filed Govt's Summary of the Law concerning Sales of Automatic Weapons.
10-13-76	Trial cont'd. adj to 10-7-76...
10-14-76	IN TRIAL COURT
10-15-76	RE: GERALDO - Bail revoked, deft REMANDED to custody of the U.S. Marshal. 4:30P.M. Conference held-Upon further information received-Deft. GERALDO's BAIL REINSTATED.
11-5-76	Sentencing date for all defts adj to 11-22-76 at 10A.M. DUFFY, J.
11-8-76	Transcript of record of proceedings, dated Sept. 21, 22, 23, 24, 27, 28, 29, 30, 1976 Oct. 1, 5, 6, 1976
11-8-76	Transcript of record of proceedings dated Sept. 15, 1976
11-23-76	Filed Deft's Pre Sentence Memorandum.
11-30-76	Filed Deft's Notice of Appeal to USCA 2nd Circuit from judgment filed 11-22-76. m-n to atty for deft Biaggi, Ehrlich & Lang, 299 Broadway, NYC 10007 and US Atty.

CONTINUED ON PAGE 4.

R. GERALDO

DATE	PROCEEDINGS	DUFFY, J
11-22-76	Filed Judgment (Atty., Gordon J. Lang, present) The defendant is committed for imprisonment for a period of FOUR (4) YEARS on each of counts 1, 2, 3, & 4, each count to run concurrently with each other. Defendant is to surrender on November 26, 1976 at 10:00 a.m. in room 36 for service of sentence. DUFFY, J	Entered on-12-1-76.
12-8-76	Filed transcript of record of proceedings, dated Oct. 7, 8, 1976	
12/27/76	Filed transcript redord of proceedings dtd: 11/23/76	
1-28-77	Filed affdvt. & notice of motion for reduction of sentence....Ret. 2-1-77....	
2-2-77	Filed transcript of record of proceedings, dated 7/20/76	
2-2-77	Filed transcript of record of proceedings, dated 11/22/76	
2-2-77	Filed memo endorsed on motion filed 1-28-77...Motion denied...So Ordered...Duffy, J.	(Notice mailed)
2-14-77	Filed notice of motion for an order vacating the sentence, dismissing the indictment granting a writ of habeas corpus	
2-17-77	Filed stip and order adjourning deft's motion returnable 2-15-77 to 2-22-77. So Ordered. DUFFY, J	

CHARGE OF THE COURT

Judge Duffy

THE COURT: Ladies and gentlemen, now that the testimony is over and the arguments are over, the time has come for you and for me to do our part in the administration of justice in this case.

Counsel for the government and counsel for the defendant have been seeking over the past few days to guide us in our job and doing justice in this case. Each has presented his own interpretation of the testimony. Now it is my province to instruct you as to the law and you must accept my instructions as to that.

It is your function to determine the facts and your decision on the facts that is final and conclusive.

In considering the evidence and determining the facts in this case, you must lay aside any question of sympathy. It is your duty as well as mine to administer justice fairly and impartially. In so doing you must be guided solely by the law and the evidence, and neither you nor I can permit our conclusions to be affected by sympathy or suspicion.

You are to discharge your duty in an attitude of complete fairness and impartiality, and, as I emphasized

2 when you were chosen as jurors, without bias or prejudice,
3 for or against the government or the defendants as parties
4 to this controversy.

5 The case is important to the government since
6 the enforcement of criminal laws is a matter of prime
7 concern to the community. Equally, it is important to
8 each defendant who is charged with a serious crime.

9 Before I turn to the indictment with which we
10 are concerned here, there are a few general observations
11 that I would like to make.

12 I instructed you at the very start of this
13 case that your important function during the proceeding
14 of taking testimony would be to listen carefully to each
15 witness as he testified, to observe him, to watch his
16 demeanor. It has been evident to me, and I think to all
17 counsel, that you followed these instructions, so now you
18 are prepared to undertake your final duty, and in the dis-
19 charge of that duty you perform a very high duty of
20 citizenship.

21 You are acting as ministers of justice. Ladies
22 and gentlemen, you are the sole and exclusive judges of
23 the facts. You pass on the weight of the evidence, you
24 determine the credibility of the witnesses, you resolve such
25 differences as there may be in the testimony and you, members,

of the jury, draw whatever reasonable inferences that you believe are warranted by the facts as you determine them.

It is your recollection of the facts that governs. Should that recollection differ from that of the lawyers or from mine, please disregard anything that we have said as far as the facts are concerned. Don't disregard the arguments, the inferences that the attorneys seek to draw, but if your recollection is different from that of theirs or mine, your recollection governs.

If you want any testimony in the case read back to you, that will be done at your request. The forelady will receive some note paper and pencils. Just write me a note and it will be done. Of course, you may also see the exhibits.

You are to consider only the facts that have been developed at this trial. You are not to be influenced by anything that you have read about criminal cases generally or that you might have seen on T.V. or heard. It is only what you heard here that counts.

At times during the trial I have been called upon to make rulings on matters of law. I might have sustained objections or overruled objections, and so on. Don't concern yourselves with my reasons for doing these things. Those are purely legal matters.

2 From time to time we have had conferences at
3 the bench or in the robing room, sometimes at the request
4 of one of the attorneys, sometimes at my request. Those
5 conferences concern purely matters of law or logistics.
6 They are of no concern to you.

7 You are not to draw any inference for or against
8 either side because of requests for such conferences. If
9 during the trial I have indicated in my questions or my
10 rulings anything which might indicate or lead you to believe
11 that I favor one side or the other, please disregard it.
12 Any questions of mine or rulings were intended purely
13 for clarification.

14 You have heard the summations of counsel. If
15 you believe that counsel stated something as to which there
16 is no evidence, you may disregard that part of what he
17 said. Statements of counsel, as I told you before, are not
18 evidence. They are arguments of advocates, not evidence.

19 Questions are not evidence. If any answer came
20 from a witness and was stricken by me, I want you not to
21 consider that evidence at all. Take out your mental eraser
22 and just take it out of your mind. The evidence is the
23 answers of the witness as you recall them, the testimony
24 they gave and the exhibits which were received into evidence.

25 Similarly, you are to treat stipulations of the

parties as real evidence, for both parties have agreed to the truth of the facts of those stipulations.

During the trial you were premitted to read the transcripts of taped conversations. The transcripts before you are in evidence, but they are intended merely as an aid to you. The tape and the videotape, you may have heard something which the transcripts do not contain. You may certainly hear and see the tapes again, if you so desire.

You have heard the testimony. How do you determine what weight to give it? How do you determine whether you are going to believe it or not? You heard it said that you are supposed to use your common sense. Thank you should do.

You saw the witnesses. How did their testimony impress you? Did they appear to be testifying honestly and frankly? In evaluating their testimony and their credibility, apply your common sense and experience, just the same way as you would in determining an important matter in your own lives.

In determining whether you have been given a true picture of the situation or not, you may and you should consider the witness' demeanor, his lack of candor or his candor, his ability to express himself, his possible bias, strength of recollection, the accuracy of recollection.

1
2 You may also consider whether a witness has a
3 possible interest in the outcome of this case. This does
4 not mean a witness necessarily will testify falsely because
5 he has an interest. It is merely a factor that you ought
6 to consider.

7 Let me give you an example. The law enforcement
8 agent who testified here might be said to have an interest
9 in the case. It is a case that he investigated and presented.
10 You may consider that and give it whatever weight you
11 believe it should have. The fact that a witness is an
12 employee of the government does not mean that you should
13 give his testimony any greater or lesser weight than you
14 do for any other witness. His testimony is to be scrutinized
15 by you in the same manner as that of any other witness.

16 I charge you that the government here is merely
17 one party to this case, and they are to be considered in
18 no different light than any other party to a law suit.

19 Counsel for the government is to be considered
20 in no different light than counsel for the defendants, or
21 any other litigant. The fact that the government is a
22 party entitles it to no greater or lesser consideration than
23 accorded any other party in a lawsuit.

24 There has been testimony before you with respect
25 to the use by the Bureau of Alcohol, Tobacco & Firearms of

the use of an undercover agent or agents and of informants. Joseph Kelly was acting in an undercover capacity and he was an agent. You may consider Vincent Coppola an informant. Whatever one thinks of undercover agents or informants, the government uses them in order to get leads about those who are violating the law.

Whether one disapproves of this or not is really beside the point, providing that such did not impinge upon the rights of the defendant. Such services are not forbidden by law, and you are not asked to determine whether or not you agree with the policy which permits the use of such agents or informants.

Credibility: Credibility is one of those nice lawyers words. It means simply do you believe the witness or not. In weighing credibility you should consider whether a particular witness' testimony is supported or whether it is contradicted by other testimony which you believe to be true.

If you find that a witness has made a material misstatement or even lied here with the intention of misleading you or others, you may disregard that part of the witness' testimony or you may disregard it all, or you may pick and choose and accept that part which you believe, that part which you find to be reliable, that part which you

choose to believe and disregard the rest.

All of these things you must consider in judging the credibility, believability, and in figuring out where the trust lies.

In considering the evidence, it is the quality of the evidence that counts, not the quantity. It is not the number of witnesses, it is not the number of exhibits. It is the quality of the evidence that counts.

Generally, if it is particularly within the power of a party to produce a witness who could give material information, material testimony, on an issue in the case, failure to call a witness may give rise to an inference that the witness' testimony might be unfavorable to that party. But whether that inference will be made is up to you to decide. You are free not to do so.

If the witness is equally available to both sides, then you may, but again need not, draw an inference against either or both of the parties.

If you find that it would be merely cumulative or repetitive, you can consider that also. A word of caution: You must always bear in mind that the law does not impose on a defendant in a criminal case the burden of calling any witness or produce any evidence. It is important that you remember that.

During my charge you will hear me refer at times to direct evidence and circumstantial evidence. It may be well for me to start off by explaining the difference between direct evidence and circumstantial evidence.

Direct evidence is something that a witness knows from what he saw, what he heard, what he observed, what he knows of his own knowledge, something which comes to him by virtue of his senses directly.

Circumstantial evidence is evidence of facts and circumstances from which one may infer connected facts which reasonably follow in the common experience of mankind.

Let me state that a little differently.

Circumstantial evidence is evidence which tends to prove a disputed fact by proof of other facts which have a logical tendency to lead the mind to the conclusion that the disputed fact has been established. Circumstantial evidence, if believed, is of no less value than direct evidence, for in either case you must be convinced beyond a reasonable doubt of the guilt of any defendant.

Let me give you an example as to what circumstantial evidence is. Let us assume that you came in this morning, it was a beautiful day out, and the shades were all drawn and you could not see out the window. After a while somebody comes walking in with a soaking wet raincoat.

A short time thereafter somebody comes in with an umbrella that is dripping wet. From this you could conclude that it is now raining. That is all there is to circumstantial evidence. You infer on the basis of reason and experience from established facts some other fact.

Let me give you another specific example of what I mean. If you find that a person, a defendant, upon being questioned by a law enforcement agent made a deliberate misstatement, then you may consider that as circumstantial evidence as to what was on his mind. You may consider it possibly as a consciousness of guilt.

Before we consider the precise charges, let me take care of a couple of other preliminary matters.

The indictment returned by the grand jury contains two separate types of counts or charges. The first count, the conspiracy count, charges that the defendants on trial, along with certain others, conspired to violate the Gun Control law and to make false and fraudulent statements to the Department of State concerning the purchase of guns.

The other counts, which I will refer to as the substantive counts, charge that particular defendants actually violated these laws by making the false statements.

Certain defendants who were named in this case were severed from this trial and have not been tried before

you. You are not to concern yourself with the reasons for such severance. The reasons are many and varied. Do not try to speculate on that. You have enough to do without speculation on a thing like that.

Certain persons who the government alleged were also not accused in this case as defendants but were named as co-conspirators, that is not to be considered by you in your deliberations, except insofar as you may consider questions of credibility.

No inferences should be drawn by you because persons are included or omitted from an indictment.

I have from time to time tried to suggest to you during this trial that guilt is personal. The guilt or innocence of each defendant here on trial must be determined with respect to him solely on the evidence against him or the lack of evidence.

The charges against him stand or fall on the proof or lack of proof against him and not on the proof against someone else.

There are certain principles of law which apply in every criminal case and to which I made some references at the beginning of this case. I will repeat them now.

The indictment is merely an accusation, it is

1 a charge. It is not evidence or proof of a defendant's
2 guilt. No weight whatsoever is to be given by you to the
3 fact that an indictment was returned against a defendant.
4 Each defendant here pleaded not guilty. The government
5 has the burden of proof, proof beyond a reasonable doubt,
6 of each of the charges alleged in the indictment.
7

8 A defendant does not have to prove his innocence.
9 On the contrary, he is presumed to be innocent of the
10 accusations contained in the indictment. The presumption
11 of innocence was in his favor throughout this entire trial,
12 it is in his favor right now, even as I instruct you, and
13 remains during the course of your deliberations in the
14 jury room.

15 The law presumes that a defendant who has
16 pleaded not guilty is innocent of the crime with which he
17 is charge. He begins the trial with a clean slate. The
18 government having made the charge must prove it beyond a
19 reasonable doubt.

20 The burden of proof never shifts. It remains
21 with the government throughout the trial. A defendant is
22 not called upon to prove his innocence. Since the burden
23 is on the government to prove the accused guilty beyond a
24 reasonable doubt of every essential element of the crimes
25 charged, the defendant has the right to rely upon the failure

of the prosecution to establish that proof. The defendant may also rely upon evidence brought out on cross examination of the government witnesses.

The law does not impose upon any defendant the duty of producing any witness. There are many reasons why a defendant may decide not to testify. He may feel that because of strain or tension he would not be a calm witness, he might be embarrassed by his lack of education, by his inability to speak well in front of a group of people. You are to draw absolutely no inference from any defendant becoming a witness or not.

I remind you once more: A defendant may rely upon the presumption of innocence and need do nothing more. The presumption of innocence to which I referred is removed only if and when you are satisfied that the government has sustained its burden of proving the guilt of a defendant beyond a reasonable doubt.

I have used the term a number of times "beyond a reasonable doubt." What does it mean? The words almost define themselves.

It is a doubt founded in reason, arising out of the evidence in this case or the lack of evidence. It is a doubt which a reasonable person would have, after carefully weighing all the evidence. A reasonable doubt

is a doubt which appeals to your reason, your judgment, your common sense, your experience. It is not a caprice, it is not a whim, it is not speculation, conjecture or suspicion, it is not an excuse to avoid what one might consider an unpleasant duty. It is not sympathy.

If after a fair and impartial consideration of all the evidence you can candidly and honestly say that you are not satisfied of the guilt of the defendant, if you have such a doubt as would cause you as a prudent person to hesitate before acting in a matter of importance, then you have a reasonable doubt, and in that circumstance it is your duty to acquit.

On the other hand, after an impartial and fair consideration of all the evidence, if you can candidly and honestly say that you do have an abiding conviction of the defendant's guilt, such conviction that you would be willing to act on such a conviction, that you would do an important matter in your own life, then you have no reasonable doubt; and under such circumstance it is your duty to convict.

One final word.. Proof beyond a reasonable doubt is not proof to a positive certainty or beyond all possible doubt. If that were the rule, it would be practically impossible for a person to be absolutely and completely convinced of any controverted fact which by its

nature is not susceptible to a mathematical computation.

As a consequence the law is that it is sufficient if the guilt of the defendant is established beyond a reasonable doubt, not beyond all possible doubt.

In our federal system there are no crimes except those that are defined and created by the statute or the laws written by Congress. In this case and in all others, the charges, the accusations made against the defendants, are made under certain federal laws. I don't believe it necessary for you to know the exact words, of these laws. Nevertheless, I think it would be a help for your background in your later consideration to give you a basic description of the laws that are involved in this case.

Title 2 of the Gun Control Act makes it unlawful for any person to transfer an automatic weapon within the United States, unless he or she has filed with the Secretary of the Treasury an application for such transfer and received permission from the Secretary of the Treasury. It also requires if it is being exported from the country that an export license be obtained from the Department of State.

Title 18, Section 1001, of the United States Code, makes it unlawful for any person to make a false statement within the jurisdiction of any department or agency of

the United States.

In order to convict the defendants, it is not necessary that you find that they conspired to violate both sections. It is sufficient if you find the defendants conspired to commit acts which if done would have violated either one of these statutes.

Count 1, the so-called conspiracy count, charges two defendants and others with conspiring and agreeing among themselves and with other persons to commit certain crimes against the United States, one, by agreeing to secretly sell weapons, munitions and other implements of war to certain buyers in the United States in a manner designed and intended to conceal from the United States Department of State and the United States Department of the Treasury the true identity of the buyers, and, also, two, by agreeing to seek and to prepare to file with the United States Department of State certain false and fraudulent documents intended to create the false appearance that certain quantities of weapons and munitions were to be purchased by foreign countries for their exclusive use by the Armed Forces in their national defense.

The second, third and fourth counts of the indictment are substantive counts and charge certain of the defendants with having made, facilitated the making of and

causing to be made certain false, fictitious or fraudulent statements and representations to the United States Department of State in connection with this alleged plan to sell, secretly sell, weapons, munitions and other implements of war to certain buyers in the United States by misrepresenting to the State Department that 10,000 Bushmaster submachine guns and 1.5 million rounds of ammunition were to be purchased by the Republic of El Salvador, located in Central America, for the exclusive use of the Armed Forces of El Salvador in its national defense, when it is alleged in fact the defendants were planning to sell the said machine guns and ammunition to buyers in the United States.

I mentioned to you the difference between Count 1, the conspiracy count, and any substantive count. A conspiracy to commit a crime is an entirely separate and different crime from the substantive crime which may be the object of the conspiracy.

The essence of the crime of conspiracy is an agreement or understanding to violate the law. Thus, if a conspiracy exists, even if it should fail in its purpose, it is still punishable as a crime. Congress has made a conspiracy or a concerted action to violate the federal law a crime entirely separate, distinct and different from a violation of law or laws which may be the object of the

2 conspiracy. Against this background, I now turn to a
3 consideration of the specific counts of the indictment.

4 Let me consider first Count 1, since the
5 essential elements contained therein are different than those
6 in the substantive counts.

7 Count 1 reads:

8 The Grand Jury charges:

9 From on or about January 1, 1976 and continuously
10 thereafter, up to and including May 15, 1976, in the Southern
11 District of New York and elsewhere, Dominick Cagianese,
12 Frank G. Alvarez, Irwin Tobocman, Robert Michaelson, Raymond
13 Geraldo, Miguel Celis and Manuel Alfonso Rodriguez, the
14 defendants, Howard Peters named herein as an unindicted
15 co-conspirator but not as a defendant, and others to the
16 grand jury unknown, unlawfully, wilfully and knowingly did
17 combine, conspire, confederate and agree together and with
18 each other to commit certain offenses against the United
19 States, to wit, violation of Title 26, United States Code,
20 Sections 5811, 5812, 5861(d) and (e) (being parts of Title
21 II of the Gun Control Act of 1968) and of Title 18, United
22 States Code, Sections 1001 and 2.

23 The objective of the conspiracy was to secretly
24 sell weapons, munitions and other implements of war to
25 buyers in the United States in a manner designed and intended

to conceal from the United States Department of State and the United States Department of Treasury the true identities of the buyers.

In order to attain their objective, the members of the conspiracy also agreed to seek to prepare and file with the United States Department of State certain false and fraudulent documents intended to create the false and misleading appearance that certain weapons and munitions were to be purchased by foreign countries for the exclusive use of their armed forces in their national defense.

Among the means by which the defendants would and did carry out the said conspiracy were the following:

(a) Between, on or about Marcy 20th and May 15, 1976, the defendants prepared, facilitated the preparation of and caused to be prepared certain false and fraudulent documents including: (i) an official United States Department of State Form DSP-5, entitled Application/License for Permanent Export of Unclassified Implements of War; (ii) a certificate, dated April 22, 1976, bearing the signature of the defendant, Colonel Manuel Alfonso Rodriguez; (iii) a copy of a purchase order for 10,000 submachine guns and 1.5 million rounds of ammunition dated May 3, 1976, signed by Howard Peters as purchasing agent on behalf of San Pan Trading Corporation; and (iv) a United States

Department of State, Office of Munitions Control, Form DSP-83, entitled Consignee Purchaser Transaction Statement signed by the defendant Colonel Manuel Alfonso Rodriguez and bearing his official government seal.

(b) On or about May 5, 1976, the defendants filed facilitated and filing of, and caused to be filed with the United States Department of State the false and fraudulent documents referred to in Subparagraphs -- the ones I just read to you.

MR. FISKE: Your Honor, except the fourth document. The indictment does not charge that the DSP-83 was actually filed.

THE COURT: I agree. I am sorry. I misspoke. I did misspeak.

DSP-83 was never filed, according to the indictment.

In order to convict a defendant on trial, the government must prove beyond a reasonable doubt the following essential elements:

One: The existence of the conspiracy charged in the indictment.

Two: That the defendant knowingly and wilfully joined himself with the conspiracy, with the intent to further its purpose.

Three: That one of the conspirators knowingly committed at least one of the overt acts set forth in the indictment at or about the time alleged, and that that overt act was done in the Southern District of New York.

I want you to know that the Southern District of New York is that part of New York State which runs from Governors Island to the Southern part of Albany County. Certainly it does not include New Jersey or El Salvador, but I charge you as a matter of fact and of law that Mt. Kisco, being located in Westchester County, is within the Southern District of New York.

If the government fails to establish each and every essential element beyond a reasonable doubt, then you must acquit the defendant on that count. If the government succeeds, your duty is to convict.

Let's consider what is a conspiracy. The idea of a conspiracy is simple. A conspiracy is a combination or agreement or understanding by two or more persons, by concerted action, to accomplish a criminal or unlawful purpose. In this instance, to unlawfully sell guns to buyers in the United States and to file false documents with the United States State Department.

The gist of the crime is the unlawful combination or agreement to violate the law. The indictment charges the

defendants with conspiring to violate two separate federal statutes.

In order to convict the defendants, however, it is not necessary that you find in fact that they conspired to violate both statutes. It is sufficient that you find a defendant conspired to commit acts which if done would have violated either one of those statutes. The success or failure of the conspiracy is totally immaterial to the question of guilt or innocence of a conspirator.

In this case the government contends that a part of the conspiracy was to file false documents with the State Department, and that that succeeded. However, as I said, the success or failure of the conspiracy is immaterial to the question of guilt or innocence.

A conspiracy has sometimes been called a partnership in crime or a partnership with criminal purpose. As to the partnership, each member becomes the agent of another. To establish a conspiracy, the government is not required to show that two or more persons sat around a table and entered into a solemn pact, orally or in writing, stating that they were forming a conspiracy to violate the law or the details or the means by which the objectives were to be attained.

Common sense will tell you that when persons in

fact undertake to enter a criminal conspiracy, much is left to unexpressed understanding. But the evidence must show in order to establish that a conspiracy did exist that its members in some way, in some manner, through any contrivance, impliedly or tacitly, came to a common understanding to violate the law, to accomplish the unlawful plan.

In determining whether there has been an unlawful agreement, you may just acts and conduct of the alleged co-conspirators which were done to carry out any apparent criminal purpose. The adage "Actions speak louder than words" is truly applicable here.

Usually the only evidence available is that of disconnected acts, conduct, conduct on the part of the alleged individual conspirators. You are to consider them as a whole, and in considering them as a whole, if they permit an inference that a conspiracy existed, and if you believe that beyond a reasonable doubt, then the government has met its burden on that element.

Items of evidence are not to be viewed in isolation but in conjunction with one another and upon the totality of all the evidence.

To become a member of the conspiracy, a defendant need not know each and every other member, nor the participat

of the other members nor the details of the conspiracy. For example, there is no proof that certain defendants knew or even met certain other defendants or the alleged co-conspirators. Each member of the conspiracy may perform separate and distinct acts at different times, at different places. Some co-conspirators may play major roles and other minor roles.

The guilt of the conspirator is not governed by the extent, duration, whether he played a greater or lesser role in the conspiracy. Even if one joined a conspiracy after it was formed and engaged in it to a degree more limited than that of most of the other co-conspirators, he is equally culpable, as long as he was a conspirator.

In other words, it is not necessary for a person to be a member of a conspiracy at the start. He can join it at any point during its progress and be held responsible for all that has been done before he joined and all that may be done thereafter, during its existence, and while he remains a member.

A conspiracy, once formed, is presumed to continue until its objectives are accomplished or there is an affirmative act of termination by its members, or it is otherwise terminated.

So too a person found to be a member of a

1 conspiracy is presumed to continue in its membership until
2 its termination or unless there is proof of his withdrawal
3 or disassociation.
4

5 As I said, you must first determine whether the
6 proof established the existence of the conspiracy as charged
7 in the indictment.

8 In deciding this, you consider all of the
9 evidence which has been admitted and such inferences as
10 may reasonably be drawn therefrom.

11 Turning now more specifically to the second
12 element which the government must prove beyond a reasonable
13 doubt, if you conclude that a conspiracy did exist, then
14 the next thing you have to do is determine whether either
15 or each defendant was a member.

16 Guilt, as I said, is personal, and you must
17 consider each defendant individually. His participation in
18 the conspiracy, if you find one did exist, must be established
19 by independent evidence of his own acts, statements, conduct,
20 and the reasonable inferences to be drawn therefrom.

21 If you find a particular defendant was a member
22 of the conspiracy, you must be satisfied beyond a reasonable
23 doubt that, aware of its purpose, a particular defendant
24 was a willing participant with intent to advance the purpose
25 of the conspiracy.

1
2 If you find that, no matter how limited the
3 participation might be, he is responsible for everything
4 that takes place in the conspiracy. Once you are satisfied
5 beyond a reasonable doubt that a conspiracy existed and
6 that a particular defendant is a member, as I told you,
7 the acts and declarations of the other conspirators made
8 during the existence or furtherance of the objects of the
9 conspiracy are considered the acts and declarations of all
10 of the members of the conspiracy, even though they were not
11 present.

12 I mentioned to you that certain evidence was
13 taken subject to connection. I told you at the time I
14 would explain it in detail to you.

15 If you are satisfied beyond a reasonable doubt
16 that a conspiracy existed and that a particular defendant
17 was a member, then the acts and declarations of any other
18 person whom you also find was a member of the conspiracy
19 made during the existence of the conspiracy and in further-
20 ance of its objects are the acts and declarations of all the
21 members of the conspiracy, even though they were not
22 present.

23 If there was a partnership, either partner
24 acts and speaks for the others in furtherance of the partner-
25 ship business, even though the other partners are not present.

It is most important that you recognize that this principle that we are talking about now applies to the acts and declarations done or made during the continuance of the conspiracy charged and in furtherance thereof. The conspiracy in this case ended at the time of the arrest of the defendants, and anything that happened thereafter cannot be considered as something that happened during the existence of the conspiracy.

In furtherance thereof, I have used those words. It means to carry out the object of the conspiracy. It does not apply to anything else which does not have those characteristics.

The existence of the conspiracy and membership therein may be established by either direct or circumstantial evidence. Either direct or circumstantial evidence will suffice if you are convinced by that evidence beyond a reasonable doubt of the guilt of the particular defendant you are concerned with at that time. In this case the government relies on both direct and circumstantial evidence.

It contends through the testimony of the agent and of James Gray and has in addition to the circumstantial evidence offered direct proof of the conspiracy.

If the reasonable inferences to be drawn from all the evidence lead you to two conclusions, however,

one favoring guilt and one favoring innocence, then you are to accept and favor that one which favors innocence.

The reason for this is that if both conclusions are reasonable, then you have a reasonable doubt. Needless to say whether a defendant knowingly and intentionally participated in a claimed conspiracy is a question of fact, including this claim of going into and determining what is in a person's mind. Science has yet to invent a device whereby we can go back in time and attach a device to a person's head and find out what he is thinking.

You are going to have to determine whether a defendant knowingly and intentionally participated from that person's act, conduct and surrounding circumstance and such inference that you may draw from those. Knowledge may be inferred from circumstances that would convince men of ordinary intelligence that this is a fact.

If you find, of course, that a defendant acted with intentional disregard or the conscious purpose of avoiding learning the truth, then the requirement of knowledge is similarly met.

If you find circumstances of secrecy, intrigue, attempts to conceal the true nature of a transaction, you may but need not consider that as circumstantial evidence of criminal intent.

The evidence, however, offered and to be considered by you on the question of knowledge should not in and of itself serve as a substitute for other proof.

It is to be considered by you with all the other evidence in the case and use your judgment. Let me give you a word of caution on this.

Mere association with an alleged co-conspirator does not establish the participation of anyone in the conspiracy, if you find one to exist, nor does association, even coupled with knowledge, make for you a conclusion that that person joined in the conspiracy. Mere presence during a conspiratorial act, coupled with knowledge but without participation, is not enough.

A conspirator must knowingly and intentionally join the conspiracy, and when I say join the conspiracy, I don't mean that he has got to receive a membership card, but I do mean that he must knowingly join in the venture. He must promote it, he has to have a stake in the outcome. In the vernacular, he has got to be in on the scheme.

Thus, even if you find a particular defendant associated with other alleged conspirators, but if you find that the latter were participants in an unlawful conspiracy, that this particular accused knew the others were engaged in such activities, that would not be sufficient to

find that particular defendant guilty on the conspiracy charge.

As I explained, statements and acts of a conspirator, of the alleged conspirator, each alleged conspirator, must be considered by you to determine whether he knowingly, wilfully and intentionally joined in the conspiracy, if you find one to exist.

If you find that he did, then statements or acts of other proven co-conspirators can be considered only if in furtherance of and during the existence of the conspiracy. Proof of a subsequent statement is not and cannot be the substitute for proof of the crime charged in this indictment.

Let me say once again, before you can find a defendant guilty, you must find that the defendant participated in the conspiracy, the conspiracy charged in this indictment, with knowledge of at least some of its purposes and with the intent to aid the accomplishment of its unlawful end.

Now we have a third element, and that is the government must prove that an overt act intended to effect an object of the conspiracy was committed by at least one of the co-conspirators after the unlawful agreement was made.

An overt act is any action or conduct which is

2 taken to achieve, accomplish or further the object of the
3 conspiracy. The purpose of requiring proof of an overt
4 act is that while parties may conspire and agree to violate
5 the law, they could change their minds and do nothing to
6 carry the agreement into effect. In that event the agree-
7 ment does not constitute an offense.

8 An overt act need not be a criminal act nor
9 need it be the very crime which is charged as the object of
10 the conspiracy. In this particular indictment a number of
11 overt acts have been alleged. You will receive a copy of
12 the indictment and of course you can refer to it. You will
13 see that a particular overt act may by itself charge
14 innocent conduct. But if it was for the purpose of further-
15 ing the conspiracy, in that event it sheds its innocent
16 appearance.

17 It is an overt act by the alleged co-conspirator
18 in furtherance of the object of the conspiracy. It is
19 not necessary for the government to prove that each member
20 of the conspiracy participated in each and every overt
21 act, since the act of ~~anyone~~ in furtherance of the conspiracy
22 becomes an act of all the other members.

23 Rapidly I am going to run through the overt
24 acts charged in the indictment.

25 In furtherance of said conspiracy and in order

to accomplish its objectives, the defendants committed the following overt acts, among others in the Southern District of New York and elsewhere:

1. On or about March 20, 1976 the defendant Robert Michaelson traveled to the Pepper Tree Restaurant, Mt. Kisco, New York in order to meet and negotiate with prospective buyers of weapons, munitions and other implements of war.

2. On or about March 21, 1976 the defendant Raymond Geraldo traveled to the Pepper Tree Restaurant, Mt. Kisco, New York and had a conversation concerning the sale of certain weapons, munitions and other implements of war.

3. On or about March 22, 1976 the defendants Dominick Cagianese and Raymond Geraldo met at the Pepper Tree Restaurant, Mt. Kisco, New York and had a conversation concerning arrangements to obtain from an official of a foreign government false and fraudulent documents to be filed with the United States Department of State.

4. On or about March 27, 1976, March 20, 1976 and April 14, 1976, at the Pepper Tree Restaurant, Mt. Kisco, New York, the defendants Dominick Cagianese, Frank G. Alvarez, Raymond Geraldo and Robert Michaelson had conversations concerning an initial sale of 10,000 submachine

guns for a price of \$2,800,000.

5. On or about April 1, 1976, the defendant Dominick Cagianese traveled to the vicinity of Winston-Salem, North Carolina in order to observe and participate in a test-firing, demonstration of a Bushmaster submachine gun.

6. In or about April 1976, the defendant Raymond Geraldo traveled to Central America for the purpose of obtaining a false and fraudulent certificate from an official of a Central American country.

7. On or about May 2, 1976 the defendants Raymond Geraldo, Robert Michaelson, Dominick Cagianese and Miguel D. Celis, met at the Pepper Tree Restaurant, Mt. Kisco, New York and had a conversation concerning a cash payment to be made to the defendant Manuel Alfonso Rodriguez in return for the defendant Rodriguez facilitating the filing of false and fraudulent documents with the United States Department of State.

8. On or about May 3, 1976 the defendants Frank G. Alvarez, Miguel D. Celis, and Raymond Geraldo met at the offices of Mott Haven Industries, Ltd., 429 Bruckner Boulevard, Bronx, New York and had a conversation concerning the preparation of false and fraudulent documents to be filed with the United States Department of State.

1
2 9. On or about May 4, 1976 the defendants Frank G.
3 Alvarez, Miguel D. Celis and Raymond Geraldo met at the
4 offices of Mott Haven Industries, Ltd., 429 Bruckner
5 Boulevard, Bronx, New York, and had a further conversation
6 concerning arrangements to file certain false and fraudulent
7 documents with the United States Department of State.

8 10. On or about May 5, 1976 the defendant Frank G.
9 Alvarez directed one of his employees to deliver certain
10 false and fraudulent documents to the United States
11 Department of State, Washington, D.C.

12 11. On or about May 14, 1976 the defendant Frank
13 G. Alvarez placed a telephone call from the offices of Mott
14 Haven Industries, Ltd., to El Salvador, Central America.

15 12. On or about May 14, 1976 the defendant Frank
16 G. Alvarez placed a telephone call from the offices of Mott
17 Haven Industries, Ltd., to the United States Department
18 of State, Washington, D.C.

19 13. On or about May 15, 1976 the defendants Manuel
20 Alfonso Rodriguez, Miguel D. Celis, Raymond Geraldo, Irwin
21 Tobocman, Robert Michaelson and Frank G. Alvarez met at the
22 Holiday Inn, Mt. Kisco, New York and discussed their plan
23 to sell weapons, munitions and other implements of war to
24 buyers in the United States.

25 14. On or about May 15, 1976 at the Holiday Inn,

Mt. Kisco, New York, the defendants Manuel Alfonso Rodriguez and Miguel D. Celis received the approximate sum of \$75,000 in cash for having provided, and having agreed to provide certain false and fraudulent documents filed and to be filed with the United States Department of State.

15. On or about May 15, 1976 at the Holiday Inn, Mt. Kisco, New York, the defendants Robert Michaelson and Irwin Tobocman received the approximate sum of \$25,000 in cash for having facilitated the preparation of false and fraudulent documents filed and to be filed with the United States Department of State.

That is all of the overt acts alleged in the indictment. The government is not required to prove each and every one of the overt acts. It is sufficient if it proves the commission of at least one of the acts in the Southern District of New York, as I explained to you before, that includes Mt. Kisco, at or about the time alleged, of course, although in this case the government claims it proved more overt acts than the one required.

I indicated that the overt act had to occur at or about the time alleged. It does not necessarily have to occur at the precise time or place as alleged. So too, the indictment charges that the conspiracy began on or about January 1, 1976 and continued thereafter until May 15, 1976.

It is not required that the government prove that the conspiracy started on a specific date or ended on that specific date.

I told you that anything that occurred after the ending date is to be considered by you only as to the defendant against whom it was offered.

It is sufficient if you find in fact that the conspiracy was formed and existed for some substantial period of time within the period set forth in the indictment, and that at least one of the overt acts was committed in furtherance of the conspiracy during that period.

These principles as a guide you will consider whether the government has by the required degree of proof established the essential elements as to each defendant.

Now let me turn to the remaining counts, Counts 2, 3 and 4.

With regard to the substantive counts, it is important that you understand that both of the defendants are not named in all three of these counts. The defendant Geraldo is charged in Counts 2, 3 and 4. The defendant Rodriguez is charged in Count 3 but not Counts 2 and 4. It may sound complicated, but it is not. Let me go through it again.

The defendant Geraldo is named in Counts 1, 2,

3 and 4. The defendant Rodriguez is named in Counts 1 and 3. With that understanding in mind, let me tell you a little bit about the law which is the basis for these substantive counts.

The statute which the defendants are charged with violating in Counts 2, 3 and 4, and when I say "defendants," remember I am trying to just shortcut it, the defendant Geraldo is named in all, 2, 3 and 4, and the defendant Rodriguez is to be considered only in Count 3, the section charged is that os 1001 of Title 18.

That section provides in pertinent part that whoever, in any manner, within the jurisdiction of any department or agency of the United States, knowingly and wilfully makes any false, fictitious or fraudulent statement or representation or makes or uses any false writing or document, knowing the same to contain a false, fictitious or fraudulent statement, and then it goes on, and what it means is, commits a crime.

Let's take a look at just Count 3 of the indictment. Perhaps I should read each, 2, 3 and 4.

Count 2: The grand jury further charges:

On or about May 5, 1976, in the Southern District of New York and elsewhere, Dominick Cagianese, Frank G. Alvarez, Irwin Tobocman, Robert Michaelson, Raymond Geraldo,

and Miguel D. Celis, the defendants, in a matter within the jurisdiction of a department or agent of the United States, to wit, the United States Department of State, unlawfully, wilfully and knowingly did make, facilitate the making of, and cause to be made certain false, fictitious and fraudulent statements and representations on a United States Department of State Form DSP-5, entitled Application/License for Permanent Export of Unclassified Implements of War that 10,000 Bushmaster submachine guns having an approximate value of \$2,550,000 together with 1.5 million rounds of ammunition for the said submachine guns were to be exported to the nation of El Salvador, Central America for use in El Salvador's national defense, whereas, in truth and in fact, the defendants then and there well knew that the said 10,000 Bushmaster submachine guns were to be sold to individuals in the United States at a price of approximately \$2,800,000 and further that the 1.5 million rounds of ammunition were to be sold to the same individuals in the United States.

Count 3 charges that:

On or about May 5, 1976, in the Southern District of New York and elsewhere, Dominick Cagianese, Frank G. Alvarez, Irwin Tobocman, Robert Michaelson, Raymond Geraldo,

1 Miguel D. Celis, and Manuel Alfonso Rodriguez, the defend-
2 ants, in a matter within the jurisdiction of a department
3 or agents of the United States, to wit, the United States
4 Department of State, unlawfully, wilfully and knowingly
5 did make, facilitate the making of, and cause to be made
6 certain false, fictitious and fraudulent statements and
7 representations on a certificate dated April 22, 1976 on
8 the official letterhead of the Estado Mayor General De La
9 Fuerza Armada, San Salvador, El Salvador, C.A., bearing the
10 signature of the defendant Manuel Alfonso Rodriguez, that
11 10,000 Bushmaster submachine guns and 1.5 million rounds
12 of ammunition for said submachine guns were to be used by
13 the armed forces of El Salvador and would not be re-exported
14 to any third party whereas, in truth and in fact, the
15 defendants then and there well knew that the said 10,000
16 Bushmaster submachine guns and the 1.5 million rounds of
17 ammunition were to be sold to individuals in the United
18 States.
19

20 Count 4. The grand jury further charges that:

21 On or about May 5, 1976 in the Southern District
22 of New York and elsewhere, Dominick Cagianese, Frank G.
23 Alvarez, Irwin Tobocman, Robert Michaelson, Raymond Geraldo,
24 and Miguel D. Celis, the defendants, in a matter within the
25 jurisdiction of a department or agency of the United States,

to wit, the United States Department of State, unlawfully, wilfully and knowingly did make, facilitate the making of, and cause to be made certain false, fictitious and fraudulent statements and representations on a purchase order, dated May 3, 1976, from San Pan Trading Corporation, 3 Wren Drive, Woodbury, New York to Mott Haven Industries, Ltd., 429 Bruckner Boulevard, Bronx, New York, that 10,000 machine guns at a price of \$245 each together with 1.5 million rounds of ammunition were to be exported to El Salvador, Central America, whereas, in truth and in fact, the defendants then and there well knew that the 10,000 machine guns were to be sold to individuals in the United States for approximately \$2,800,000 and further that the 1.5 million rounds of ammunition were to be sold to the same individuals in the United States.

In order to find the defendant Geraldo guilty on Counts 2, 3 and 4 or the defendant Rodriguez guilty on Count 3, you must be satisfied beyond a reasonable doubt of four things.

First, that on or about the dates charged, the defendants or the defendant that you are considering at the time made or facilitated the making of and caused to be made certain statements or representations.

Two, that the representations or statements

were false, fictitious or fraudulent.

Three, that the defendant you are considering knew that the statements or representations were false, fictitious or fraudulent.

Four, that the statements or representations were made within the jurisdiction of a department or agency of the United States.

I charge you as a matter of law that the United States Department of State is a department, as that word is used in this case, a department of the United States.

The first element that the government must prove is that the defendants that you are considering made, facilitated or caused to be made certain statements.

With respect to Count 2, the statement which the government contends was made is Exhibit 30, a Form DSP-5, Application for License for the Export of 10,000 submachine guns.

With respect to Count 3, the statement that the government contends was false was Government's Exhibit 31, end use certificate, typed in Spanish, and bearing a signature which purported to be that of Manuel Alfonso Rodriguez.

With respect to Count 4, the statement which the government contends was made is Government's Exhibit 32,

1 purchase order from San Pan Trading Corporation to Mott
2 Haven Truck Parts, Inc.

3
4 As I said before, the counts of the indictment
5 charge that the acts involved occurred on or about a
6 certain date. It does not matter if the specific transaction
7 is alleged to have occurred on that date and the evidence
8 and you find that it occurred on some other date. The law
9 requires only substantial similarity between the dates
10 alleged in the indictment and those that you find are
11 established by the evidence.

12 Secondly, the government must show that the
13 statements that were made facilitated or caused to be made,
14 were false, fictitious or fraudulent.

15 The government contends that the three state-
16 ments reflected in these counts were false because they
17 represent that the 10,000 Bushmaster submachine guns and
18 1.5 million rounds of ammunition were to be sold to and used
19 by the Armed Forces of El Salvador, when, it is alleged, the
20 submachine guns and ammunition were going to be sold to and
21 used by purchasers in the United States.

22 The third element, the government must show
23 that the defendant knew that the statements were false.
24 This involves a question of knowledge and intent. Whether
25 there is knowledge and intent is a question that you must

find from all the facts and surrounding circumstances.

If you find that a defendant acted by mistake, inadvertance or for some other reason, then he cannot be found guilty to have knowingly committed the offense charged.

On the other hand, if you find that the statements and representations were made by a defendant when he knew these statements and representations were false, then this third element is proved.

With respect to the defendants' knowledge and intent, you will recall that the defendants are charged with having acted knowingly, wilfully and unlawfully.

I direct your attention to the words knowingly and wilfully. What do those words mean? Is there something mysterious or complicated about the words knowingly and wilfully?

Let me tell you what the words do not mean. They do not mean that the government has to show that the defendant knew that he was breaking a particular law to be convicted of a crime. They do not mean that the government has to show that the defendant intended to profit at the expense of the government.

The words knowingly and wilfully mean deliberate intentionality. In other words, knowingly and wilfully mean

1
2 that a defendant made the false statement or false state-
3 ments with knowledge that the statement or statements were
4 false and that he intended to make them deliberately and
5 in the free exercise of his will.

6 If there was an innocent misstatement made by
7 the defendant, if he had made an erroneous or incorrect
8 statement, but innocently, he would not be guilty of the
9 crime of making a false statement or representation. If
10 he made an erroneous or incorrect statement due to the slip
11 of the tongue or bad memory or through misunderstanding,
12 he would not be guilty of making a false statement within
13 the statute.

14 But if the defendant was aware of the fact that
15 he was making a false statement and he knew and believed
16 that the statement was false or fictitious, then he was
17 acting knowingly and wilfully.

18 Knowledge and intent, of course, exist in the
19 mind. It is not possible to look into somebody's mind to
20 see what he thought, what he knew. The only way you have
21 for arriving at a decision on those questions is for you to
22 take into consideration all the facts and circumstances
23 shown by the evidence, including the exhibits, and determine
24 from all of this whether the requisites of knowledge and
25 intent were present at the time in question.

1 The fourth element, with respect to each
2
3 count, it is that the statement be made within the juris-
4 diction of a department or agency of the United States.
5 As I already told you, the United States Department of State
6 is a department of the United States, within the meaning
7 of this statute.

8 If you find that a defendant submitted documents
9 to the United States Department of State on a matter pending
10 before it, then the fourth element is satisfied.

11 The crimes charged in Counts 2, 3 and 4 are
12 completed on the filing of the alleged false statement.

13 Section 1001 has nothing to do with whether
14 or not the government agency that received the documents
15 were fooled or were defrauded by them. It is enough that
16 the government prove that the false statements or false
17 documents were filed with the government agency, not that
18 the agency ever acted upon them, nor is it necessary that
19 you find that the State Department would have approved
20 the application. Even if the State Department had turned
21 down the application, the filing of a false statement, if
22 you find it that such happened, then you can also find that
23 the statute was violated.

24 There is one other statute that I must
25 mention to you.

In connection with the crimes charged in Counts 2, 3 and 4, the government contends that the defendant Geraldo in all three counts and the defendant Rodriguez in Count 2 may be held responsible for the filing of the documents under the so-called aiding and abetting statute.

Let me read that to you. It is fairly simple. Whoever commits an offense against the United States or aid, abets, counsels, commands, induces or procures the commission is punishable as a principal. Whoever wilfully causes an act to be done which if directly performed by him or another would be an offense against the United States is punishable as a principal.

It is not necessary for the government to show that any defendant personally committed the crime charged under this law.

A person who aids and abets another to commit the offense is just as guilty of the offense as if he himself committed every act in relation to it.

You may find, therefore, a defendant guilty of a substantive offense if you find beyond a reasonable doubt that one defendant committed an offense and that another defendant aided and abetted him.

In order to find that a defendant aided and abetted, you must be satisfied that the particular defendant

1 in some way knowingly associated himself with the criminal
2 venture and knowingly participated in it as something he
3 wished to bring about and by some action of his tried to
4 make it succeed, that he had, as I said before, a stake
5 in the venture.
6

7 In other words, if one fully aware of what he
8 is doing plays a significant role in the furtherance of a
9 transaction prohibited by law, he is an aider and abettor,
10 and as such is equally guilty with the person who directly
11 performed the illegal acts which constitute the crime.

12 There are a few other general matters, and very
13 few, which I want to take up with you before you begin
14 your deliberations.

15 As I said, you may have heard an inference at
16 some time as to possible sentence. I told you, you are the
17 sole judges of the facts. Sentences are none of your busi-
18 ness. That's my duty, and it is a very heavy one. Don't
19 burden yourself with being more than judges of the fact.

20 Matters of law I am required to handle. The
21 law which you need to know is what I have been trying to
22 give you in this charge to you.

23 All of the evidence, both direct and cross
24 examination, and the exhibits should be considered by you.

25 Let me remind you again, to prevail the

government must prove with respect to each count the essential elements as I have outlined them beyond a reasonable doubt.

I have explained to you that if it does so, your verdict must be guilty. If it fails, your verdict must be not guilty.

You must consider each count separately and render a separate verdict as to each count. You must consider each defendant separately and render a separate verdict as to each defendant.

You may render a verdict of guilty on each count or a verdict of not guilty on each count or guilty on one count and not guilty on others, and so on and so forth. That is entirely within your province.

There will be twelve of you on the jury that will deliberate. If you are to find a defendant guilty, your verdict must be unanimous. No one should enter into deliberations in a jury room with such a pride that you would refuse to change your opinion if convinced by the intelligent arguments on the part of another juror or jurors. However, don't do violence to your own opinion. You are entitled to that opinion.

Each one of you must decide this case for himself or herself after reviewing the evidence and exchanging

2 views with your fellow jurors.

3 If you wish any part of the exhibits, they
4 will be sent in to you, except for the tape recording which
5 for technical reasons will have to be played to you here.

6 If you wish any of the testimony read back to
7 you, it will be.

8 This is an important case. Every criminal case
9 is important. It is important to the government. You know
10 how important it is to the defendants. Please handle it
11 in an important manner. Decide the case solely on the
12 evidence or the lack of evidence and the law as I have
13 charged it to you.

14 Gentlemen, do you wish to see me?

15 MR. LANG: No, your Honor.

16 MR. HALLINAN: No, I have no exceptions. I
17 would like to request again in haec verba my requests to
18 charge.

19 THE COURT: It was done my way.

20 Mr. Fiske?

21 MR. FISKE: We are satisfied with the charge,
22 your Honor.

23 (At this point, one marshal was duly sworn)

24 THE COURT: I told you that there will be
25 twelve of you deliberating. Mr. Enrique Negron, Miss

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Esther L. Mosca and Miss Joan M. Treble, you may be excused
at this point.

Madam Marshal, would you be good enough to
escort the jury to the jury room.

(Jury commenced deliberations at 11:35
a.m.)

end take



ESTADO MAYOR GENERAL
DE LA
FUERZA ARMADA
SAN SALVADOR, EL SALVADOR,
C. A.

FECHA: _____

ASUNTO: _____

OFICIO No

DEPENDENCIA

CLASIFIC

USA 135-475 (ED 4-2-71)
9/24/76
GOVERNMENT'S
76 CR 503140
EXHIBIT
U. S. DIST. COURT
S. D. OF N. Y.
11 <i>[initials]</i>

[Handwritten signature]



ESTADO MAYOR GEN.
DE LA
FUERZA ARMADA
SAN SALVADOR, EL SALVADOR
C. A.

FECHA: 22 De Abril De 1976

ASUNTO:

OFICIO No
DEPENDENCIA
CLASIFIC

San Pan Trading Corporation
3 Wren Drive
Woodbury, New York 11797

SEÑORES;

POR LA PRESENTE CERTIFICAMOS QUE LAS DIEZ MIL AMETRALLADORAS
"BUSH MASTER" QUE HEMOS ORDENADO DE USTEDES SON PARA EL
USO DE LAS FUERZAS ARMADAS DE NUESTRO PAIS Y NO SERAN
RE-EXPORTADAS NI CEDIDAS EN PARTE O TOTALMENTE A UN
TERCERO,

DIOS, UNION, LIBERTAD

Manuel Alfonso Rodríguez
Coronel de Artillería D.E.M.
Jefe Del E.M.G.F.A.

10-12-503-1-5

79 SA

USA 316-475 (ED 4-21-71)
GOVERNMENT'S
EXHIBIT
U. S. DIST. COURT
S. D. OF N. Y.
15 <i>id.</i>

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ESTADO MAYOR GENERAL
DE LA
FUERZA ARMADA
SAN SALVADOR, EL SALVADOR

FECHA: 22 De Abril De 1976

ASUNTO:

OFICIO No. 4

DEPENDENCIA

CLASIFICACION

USA 338-475
(ED 4-23-71)

GOVERNMENTS

EXHIBIT

U. S. DIST. COURT

S. D. OF N. Y.

SEP 24 1976

19 ~~18~~

San Pan Trading Corporation
3 Wren Drive
Woodbury, New York 11797

SEÑORES:

POR LA PRESENTE CERTIFICAMOS QUE LAS DIEZ MIL AMETRALLADORAS
"BUSH MASTER" QUE HEMOS ORDENADO DE USTEDES SON PARA EL
USO DE LAS FUERZAS ARMADAS DE NUESTRO PAIS Y NO SERAN
RE-EXPORTADAS NI CEDIDAS EN PARTE O TOTALMENTE A UN
TERCERO.

ESTE CERTIFICADO TAMBIEN CUBRE UN MILLON QUINIENTOS MIL CAR-
TUCHOS CALIBRE 5.56mm.

DIOS, UNION, LIBERTAD

M. A. Rodríguez
M. A. Rodríguez
Coronel de Artillería D.E.M.
Jefe Del E.N.G.F.A.

80 SA



ESTADO MAYOR GENERAL
DE LA
FUERZA ARMADA
SAN SALVADOR, EL SALVADOR,
C. A.

FECHA: 22 De Abril De 1976

ASUNTO:

Oficio No. 4 000

DEPENDENCIA:

CLASIFIC:

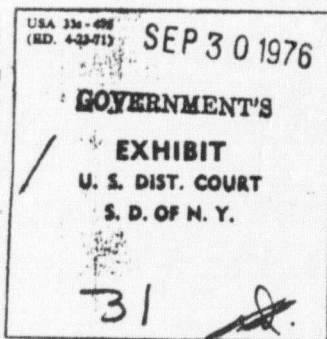
San Pan Trading Corporation
3 Wren Drive
Woodbury, New York 11797

SEÑORES:

POR LA PRESENTE CERTIFICAMOS QUE LAS DIEZ MIL AMETRALLADORAS
"BUSH MASTER" QUE HEMOS ORDENADO DE USTEDES SON PARA EL
USO DE LAS FUERZAS ARMADAS DE NUESTRO PAIS Y NO SERAN
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DIOS, UNION, LIBERTAD

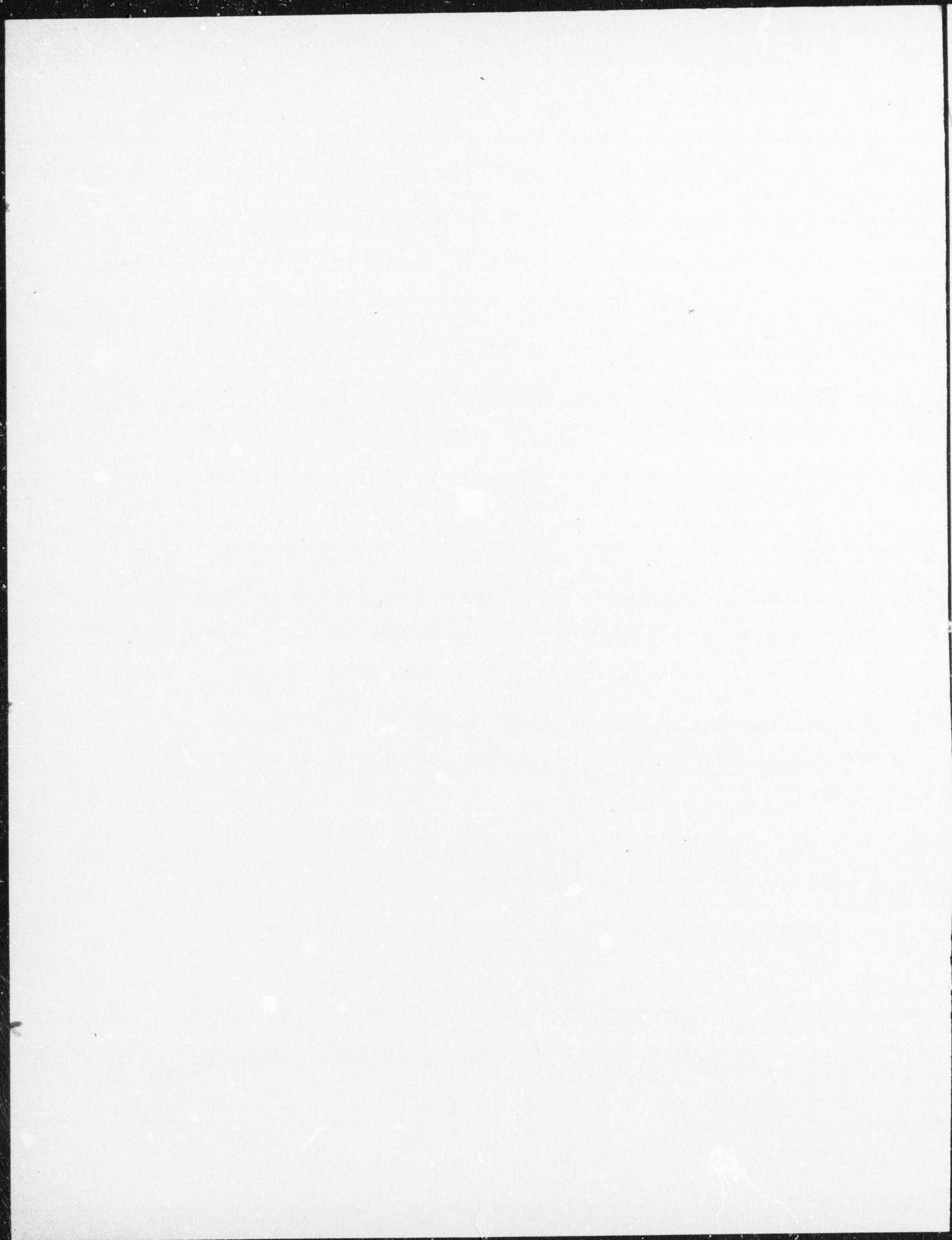


Manuel Alfonso Rodriguez
Manuel Alfonso Rodriguez
Coronel De Artilleria D.E.M.
Jefe Del E.M.G.F.A.

81 SA

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Rec'd. 4/28/77
Dr. Rottenberg
U.S. Atty's Office



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